2004-01-01

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Recommended Citation

Carolan, B. (2004) The Search for Coherence in the Use of Foreign Court Judgements by the Supreme Court of Ireland. *Journal of Comparative and International Law*, Vol12, 1, 2004-2005, pp. 123-148.

1-1-2004

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THE SEARCH FOR COHERENCE IN THE USE OF FOREIGN COURT JUDGMENTS BY THE SUPREME COURT OF IRELAND

Bruce Carolan†

I. INTRODUCTION

The citation of decisions of foreign courts in the decisions of the U.S. Supreme Court has sparked controversy. This controversy flared in the case of *Lawrence v. Texas*.[1] Justice Kennedy cited the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*[2] in the course of striking down a Texas statute that criminalized same-sex sodomy.[3] Justice Scalia criticized Justice Kennedy for citing the European Court of Human Rights in interpreting the U.S. Constitution.[4]

This paper attempts to offer some insight into the debate by exploring the issue from a European perspective. Specifically, this paper explores citation of decisions by "foreign" courts by the Supreme Court of the Republic of Ireland in several well-known Irish cases.

There are a number of similarities between the U.S. and Irish Constitutional systems. Ireland, a former British colony, inherited its common law system from the United Kingdom upon attaining its

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† Bruce Carolan, Head of School of Social Sciences and Legal Studies, Dublin Institute of Technology. This paper is based on comments made at the 2004 University of Tulsa College of Law Symposium: *International Law and the 2003-04 Supreme Court Term: Building Bridges or Constructing Barriers Between National, Foreign, and International Law?* My thanks to Professors Linda Lacey and Janet Levit and to the University of Tulsa College of Law for inviting me to participate in this conference. My thanks to Dr. Fergus Ryan, Dublin Institute of Technology, for valuable comments.

1. 539 U.S. 558 (2003).
2. 45 Eur. Ct. H.R. (ser. A) (1981).
3. *Lawrence*, 539 U.S. at 573.
4. *Id.* at 598.

independence in 1922. Ireland has a written Constitution and a set of enumerated personal rights similar to those contained in the first ten amendments to the U.S. Constitution. The Constitutional courts of Ireland employ interpretive methods familiar to a U.S. lawyer. Ireland, as a former colony, jealously guards its sovereignty. In some ways, Ireland is closer to the legal system of the U.S. than to the civil law systems of other Member States of the European Union, which Ireland joined in 1973.

This paper explores the willingness of the Irish Supreme Court to employ decisions of three "foreign" courts in interpreting the Irish Constitution. These courts are the European Court of Human Rights, the European Union Court of Justice and the U.S. Supreme Court. The attitude of the Irish Supreme Court towards considering the decisions of these three courts appears inconsistent. While the Irish Supreme Court has been willing to consider decisions of the European Union Court of Justice and the U.S. Supreme Court, the Irish Supreme Court has been hostile to considering decisions of the European Court of Human Rights.

The difference in approach is partially, but not completely, explained by reference to the Irish Constitution. The Irish Constitution expressly privileges the law of the European Union over other forms of international agreements.[5] However, from a Constitutional perspective, the decisions of the U.S. Supreme Court implicitly occupy the same position as decisions of the European Court of Human Rights. The Irish Supreme Court should be equally dismissive of decisions of the U.S. Supreme Court as they are of decisions of the European Court of Human Rights. The Irish Supreme Court, however, grants far more deference to U.S. Supreme Court decisions than it does to decisions of the European Court of Human Rights.

What explains this seeming incoherence in approach? One must go beyond the express provisions of the Irish Constitution to understand the hostility of the Irish courts towards decisions of the European Court of Human Rights. A full understanding of the willingness of the Irish courts to consider citations of foreign courts depends, in part, on an understanding of the unstated relationship between the Irish court and the foreign courts. Where the relationship is horizontal – in the sense that the Irish court cannot directly be overruled or deemed to have provided an incorrect interpretation of the foreign law by the court whose decisions are offered for consideration – the Irish court is open to considering the foreign court's opinion. Where the relationship is vertical – in the sense that the foreign court can give a conflicting interpretation of the foreign law that will be regarded as superior to the Irish court interpretation – the

5. Art. 29, Constitution of Ireland, 1937.

Irish Supreme Court is hostile to consideration of the foreign court's decision.

Part II of this article reviews the relevant portions of the Irish Constitution, and makes comparisons with analogous provisions of the U.S. Constitution. Part III examines the relationship between the Irish judicial system and "foreign" law. "Foreign" law is divided into international law, foreign national law, and supranational law for purposes of this examination. Part IV analyzes the attitude of the Irish Supreme Court towards considering decisions of courts applying "foreign" law in the context of several well-known Irish cases. Part V sets forth a tentative premise for apparent inconsistency in the Irish Supreme Court's attitudes towards decisions of courts applying foreign law. Part VI concludes the article, with a brief observation on the possible relevance to a similar issue in the U.S. Supreme Court.

II. IRISH CONSTITUTION[6]

A. Background and Government Structure

The Republic of Ireland attained its independence from the United Kingdom in 1922. The modern Irish Constitution is Bunreacht nah Éireann or Constitution of Ireland 1937. This Constitution was drafted primarily by the Prime Minister of Ireland, Éamonn de Valera, with considerable input from the Irish Roman Catholic Church.[7] The 1937 Constitution replaced the Constitution of the Irish Free State, which had been adopted in 1922.

In adopting a written Constitution, Ireland rejected the traditions of its former colonial master, the United Kingdom, which lacked and still lacks a written Constitution. Ireland's adoption of a single document comprising the national Constitution is closer to the experience of another former British colony, the U.S.

There are similarities as well as differences between the forms of government established by the modern Irish Constitution and the U.S. Constitution. The Irish Constitution establishes a tripartite form of government consisting of an executive, legislative, and judicial branch. On the other hand, Ireland's Constitution retains aspects of the parliamentary form of government found in the United Kingdom. For example, the executive branch of government is not directly elected, as in the U.S.

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6. For a general discussion of the Irish Constitution and its history, see FERGUS W. RYAN, CONSTITUTIONAL LAW (2001).

7. *Id.* at 3.

Instead, the party or parties who win the majority of seats in elections for the legislative branch, as in the United Kingdom, form the executive. (Coalition governments, consisting of two or more national parties, are the norm in Ireland, as one party rarely attains an overall majority of available seats in the legislature.)

As in the United Kingdom, the parties forming the executive branch select the Prime Minister, or an Taoiseach, who, in essence, becomes the official most closely resembling the U.S. President. (The President of Ireland, currently Mary McAleese, largely holds a ceremonial post and is in fact forbidden from giving an opinion on the political issues of the day.) The Taoiseach must have been elected to one branch of the Irish legislature, the Dail, which is the "lower" house of the Irish Parliament, the Oireachtas, in order to be eligible for appointment. Thus, only a relatively small number of voters – those who reside in the constituency in which the Taoiseach runs for the Dail – actually vote for the official who becomes Ireland's prime minister. (On the other hand, the entire electorate of the Republic of Ireland votes for the largely ceremonial post of Irish President who, ironically, comes from the United Kingdom, i.e., Northern Ireland, although she is an Irish citizen).

As in the U.S., the Irish legislature is divided into two branches. The lower house is called the Dail. The upper house is called the Senate. However, the powers of the Irish Senate more closely resemble those of the United Kingdom's House of Lords. The Irish Senate, for instance, lacks the power to prevent the adoption of legislation approved by the lower house of the Irish legislature.

The Irish Constitution owes much to the U.S. Constitution. Nevertheless, the resulting form of government is a hybrid, combining elements of both the U.S. and United Kingdom systems of government. In one important sense, however, the Irish Constitution is much closer to the U.S. experience than that of the United Kingdom. The affinity of the Irish Constitution to U.S. Constitutional principles is perhaps strongest in its protection of individual rights.

1. Irish and U.S. Constitutions and Individual Rights

The Irish and U.S. Constitutions are similar in the sense that both contain an enumeration of individual rights. Both U.S. and Irish Constitutional law contain unstated personal rights. In the U.S. some of these rights, such as privacy, emanate from a penumbra created by the Constitution's enumerated rights. In Ireland these unenumerated rights are said to flow from the Christian and democratic nature of the state and inhere in individuals by virtue of their human personality. The Irish Constitution expressly provides for judicial review of Irish legislation

against the rights guaranteed by the Irish Constitution.[8] Judicial supremacy in the interpretation of the U.S. Constitution is a judicially-created doctrine.[9]

Combined with this express provision of judicial review is strict judicial observance of the separation of powers, and of a grant of exclusive law-making power to the Irish legislature, the Oireachtas.[10] The remedy in Ireland for a judicial determination of unconstitutionality typically is an order striking down the offending legislation.[11] The Irish constitutional courts largely decline to order affirmative injunctive relief against the government, such as that observed in court orders in the U.S.

2. Challenges to Constitutionality of Irish Legislation

At several points in its Constitutional history, Ireland has "inherited" a set of pre-existing laws that might, or might not, pass scrutiny under a later-adopted Constitution. For example, upon achieving independence in 1922, the new Free State of Ireland faced a choice. It could have rejected, wholesale, the pre-existing body of law imposed upon it by the British government, or it could adopt the bulk of those laws, subject to some type of review against standards set forth in a written constitution.

The Free State of Ireland chose the latter option. The Free State government largely adopted the legal structure established in Ireland by the British Government, e.g., the court structure, the written laws, the common law judicial system, and the division of the legal profession between solicitors and barristers. However, unlike the British system, the new Irish government adopted a written constitution, with an express provision for judicial review.[12] The new Irish Constitution acted as a type of filter. All laws existing at the time of the creation of the Irish Free State were deemed to be part of the newly established Irish legal order, provided they did not offend against any provisions of the later adopted Irish Constitution.

This same "screening" procedure was followed with the adoption of the 1937 Irish Constitution. When the 1937 Irish Constitution was adopted, there existed a body of statutory and common law, some of which might have offended the terms of the newly adopted Constitution. The 1937 Constitution anticipated this possibility and provided that it would act as a "screen" or "filter" through which pre-existing laws would be required

8. *Id.* at art. 34.3.2.

9. Marbury v. Madison, 5 U.S. 137 (1803).

10. *Id.* at art. 15.2.1.

11. *See id.* at 15.4.2.

12. Art. 65, Constitution of the Irish Free State, 1922.

to pass.[13] Of course, legislation adopted after the enactment of the 1937 Constitution must also be in accordance with the Constitution.[14]

The foregoing observations provide a domestic law framework for the Irish courts' approach to issues of the constitutionality of Irish law. It informs discussion relevant to this conference, namely, the willingness of Constitutional courts to entertain arguments based at least partially on "foreign" law, in the form of decisions of foreign courts. To complete the picture, however, it is necessary to divide such foreign law into three possible types: international law, foreign national law, and supranational law. Having divided the potential source of foreign law judgments in this way, it is necessary to consider the express constitutional position of Ireland relative to two of these sources, namely international law, and supranational law.

III. IRELAND AND "FOREIGN" LAW

A. The Irish Constitution and International Law

There are two distinctive aspects of the Irish Constitution relevant to exploring the willingness of Irish Constitutional courts to entertain arguments based on decisions of courts applying international law. First, the Irish Constitution provides that only the legislature, or Oireachtas, has the power to make law: "no other legislative authority has power to make laws for the State."[15] It follows that no "foreign" body, whether the British Parliament or an international body, has power to legislate for Ireland. This provision also contributes to the reluctance of the Irish Constitutional courts to order affirmative injunctive relief, as this would be seen as usurping the legislature's exclusive right to make law.

Elsewhere, the Irish Constitution provides that international agreements to which Ireland is a party shall not become part of the domestic Irish law unless and until such laws are incorporated into domestic law by an act of the Irish legislature.[16] The Irish position with respect to international law is commonly referred to as "dualist," in which domestic and international law are seen as occupying two separate and independent spheres; international law penetrates domestic law only to the extent that the Oireachtas adopts a piece of legislation formally transposing international law into the domestic law. A corollary of this

13. *See* art. 50, Constitution of Ireland, 1937.

14. *Id.* at art. 15.4.1.

15. *Id.* at art. 15.2.

16. *Id.* at art. 29.6.

view is a limitation on the ability of an individual to rely upon international law in the Irish courts.

Several of Ireland's European neighbors, by contrast, subscribe to a "monist" perspective on the relationship between international and domestic law. Under a monist perspective, domestic and international law both may be relied upon in the national courts. The relationship between international and domestic law depends upon application of domestic Constitutional law. For example, international law might be regarded as superceded by later domestic law. But there is not a constitutionally-created wall preventing reliance upon international law in the domestic courts.

1. The Irish Constitution and Foreign National Law

The Irish Constitution does not expressly deal with the issue of the influence of foreign national law, which would include judgments of foreign national courts. However, logic dictates that foreign national law should occupy approximately the same position as international law in the Irish Constitutional order. The Irish Constitution provides that only the legislature has power to make laws for Ireland, and that no other legislative authority has power to make laws for the State.[17] This Article may be a response to Ireland's previous status as essentially a colony of Great Britain, subject to the laws enacted by the British Parliament.[18] However, it would apply also to laws enacted on the other side of the Atlantic, whether these laws are "enacted" by the U.S. Congress or by the U.S. Supreme Court.

In addition, the fact that international agreements do not become part of Irish domestic law unless adopted by the Irish legislature would seem to stand as a bulwark against other types of foreign law, such as foreign national law. Unlike the international agreements that are the focus of the Irish Constitution,[19] Ireland is not a party to and played no role in the adoption of foreign national law. The constitutional argument for rejecting foreign national law as a consideration in interpreting the Irish Constitution is at least as strong as, if not stronger than, the argument for relying upon international law in interpreting the Irish Constitution.

17. *Id.* at art. 15.2.

18. Technically, Ireland was not a colony of Great Britain, but was completely absorbed by and a part of The United Kingdom of Great Britain and Ireland.

19. Art. 29.6, Constitution of Ireland, 1937.

2. Irish Courts and Supranational Law

The status of the law of the European Union in the Irish Constitutional order differs from the express status of international law and the implicit status of foreign national law. European Union law is a species of international law, and under the Constitutional provisions discussed thus far, would be rejected as a relevant source of authority in interpreting the Irish Constitution. However, Irish Constitutional courts accept the law of the European Union as a source of law that can be invoked directly by individuals and which Irish courts are bound to uphold.[20] Furthermore, the Irish courts regard European Union law as supreme to domestic law, even to Irish Constitutional law.[21]

The reasons for the direct effect and supremacy of European Union law in Irish domestic courts differ depending upon the perspective from which one examines the issue. Both perspectives reach the same conclusion: European Union law has direct effect in Irish domestic courts and is supreme to Irish domestic law. However, the reasoning differs. The law of the European Union provides one explanation for the direct effect and supremacy of European Union law. Irish domestic law provides another explanation. This is a potential source of Constitutional tension between the national Irish legal order and the supranational legal order of the European Union.

Ireland joined the then European Economic Community (EEC) in 1973. The European Economic Community Treaty of 1957[22] and subsequent treaties, on which Community law rested, required, among other things, the immediate incorporation of Community law into the domestic law of the Member States.

For example, what is now Article 249 (formerly Article 189) of the European Community Treaty provided for the adoption of various types of Community law, including regulations.[23] With respect to regulations, the Treaty provided, "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."[24] In addition, by 1973 the European Court of Justice had ruled that Community Treaty Articles themselves, if they satisfied certain conditions, had direct effect in the domestic laws of the Member States and were

20. *See id.*

21. *Id.*

22. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

23. *Id.* at art. 189.

24. *Id.*

supreme to the laws of the Member States, including the constitutional law of the member state.[25]

The EEC Treaty and subsequent Treaty Articles, as well as regulations adopted by the Community institutions, constituted a form of international agreement and/or a law enacted by a legislative authority other than the Irish Oireachtas. The Irish Constitution provides that international agreements do not become part of domestic law without an express incorporation of such law into the Irish law. Furthermore, the Irish Constitution provides that no other legislative authority could enact laws for Ireland.

How then did the Irish Constitutional order accommodate the requirements of Community law that such law be given direct effect and supremacy? The answer depends upon to whom one puts the question.

According to the European Court of Justice, it is the nature of European Union law itself that accounts for the direct effect and supremacy of European Union law. In the famous case of *Van Gend en Loos*, the European Court of Justice wrote that the then European Economic Community constituted a new legal order in international law, which possessed both direct effect and, implicitly, supremacy in the domestic laws of the Member States.[26] This ruling was made without regard to and quite independent of the constitutional law of the Member States. In fact, the Court rejected the Advocate General's opinion that the issue was properly one for the Member States to resolve under their respective national Constitutions.[27]

Ireland would provide a different explanation for the direct effect and supremacy of the law of the European Union, grounded in the express terms of the Irish Constitution. Ireland amended its Constitution by referendum to accommodate its membership in the EEC. The amended Constitution provides that laws enacted by the institutions of the European Community, such as regulations, become part of Irish domestic law without the need for transposing legislation by the Irish Oireachtas.[28] Article 29.4.10 further provides that such laws, as well as laws enacted by the Irish government to fulfill commitments of membership in the Community, are supreme to Irish law, including the Irish Constitution.[29] It

25. Case 26/62, Van Gend en Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. 3.

26. *Id.*

27. *Id.*

28. Art. 29.4.10, Constitution of Ireland, 1937.

29. *Id.*

achieves the latter result by providing that the Constitution cannot be used to challenge the legality of either type of law.[30]

Under the Irish perspective, the direct effect and supremacy of European Union law could be eliminated by the repeal of the relevant constitutional law attributing such qualities to European Union law. Under the perspective of the European Court of Justice, however, the direct effect and supremacy of European Union law undoubtedly is seen as a consequence of European Union law, which occurred irrevocably upon Irish accession to the EEC 1973. Thus, there is the potential for a national/supranational constitutional crisis, should Ireland ever seek to revoke or revise its national constitution regarding the direct effect and supremacy of European Union law.

The foregoing provides a backdrop against which to undertake a close reading of several high-profile Irish Constitution cases, in which arguments were presented to the Irish Supreme Court that invoked, if only by analogy, decisions of courts applying foreign national law, such as the U.S. Supreme Court, or decisions of courts applying international law, such as the European Court of Human Rights. The next section looks at several such cases.

However, reference by the Irish Supreme Court to decisions of the supranational European Union Court of Justice constitutes a special case in the analysis. This situation will be examined first.

IV. REFERENCE TO "FOREIGN" COURT DECISIONS BY THE IRISH SUPREME COURT

A. Irish Supreme Court and European Union Court of Justice

The Irish Supreme Court has shown great deference to the law of the European Union, and to the decisions of the European Court of Justice. For example, in *Campus Oil Ltd. v. Minister of Industry & Energy (No.2)* the Supreme Court expressly acknowledged the supremacy of European Union law over Irish law, including the Irish Constitution.[31] In that case, one of the parties had appealed against a decision of the Irish court to make a preliminary reference to the European Court of Justice,[32] a procedure explained in more detail below. The Supreme Court held that such an order could not be appealed, even though Article 34.3.3 of the Constitution of Ireland provides that a party has a right to appeal all

30. *Id.*

31. [1983] I.R. 88 (Ire.).

32. *Id.*

decisions of the Irish High Court to the Irish Supreme Court.[33] This deference to European Union law exceeded what was required under European Union law itself, as the European Court of Justice subsequently held that the law of the European Union did not preclude the appealability of such orders of reference.[34]

The Irish Supreme Court will apply the law of the European Union in an action brought before it. The Irish Supreme Court will not, generally speaking, undertake to interpret the law of the European Union as it applies in a particular case. That is, the Irish Supreme Court will unquestioningly apply an interpretation of the European Court of Justice in a case, but will not undertake to interpret European Union law in the absence of a definitive ruling by the European Court of Justice.

Mr. Justice Griffin described this state of affairs in the case of *Campus Oil Ltd.* when he wrote, "it would be highly undesirable, to put it at its lowest, for this Court to interpret those [directly-effective Treaty] articles in anticipation of the rulings of the [European] Court of Justice. . . . It is for the [European] Court of Justice to *interpret* the provisions of the Treaty, and it is for our Courts to apply it."[35]

Thus, on the spectrum of the relationship between the Irish Supreme Court and the decisions of courts interpreting "foreign" law, the decisions of the European Union Court of Justice occupy the high end of Irish Supreme Court deference to these decisions. With respect to these decisions, the Irish Supreme Court abdicates its core judicial function of interpreting the law that is directly applicable in the Court. Of course, the express provisions of the Irish Constitution account for a significant portion of this deference. However, as demonstrated by *Campus Oil*,[36] where the Irish Supreme Court erroneously ruled that the law of the European Union precluded an appeal from an order making a preliminary reference to the European Court of Justice, the Irish Supreme Court's deference goes beyond what is strictly required under the Irish Constitution and European Union law.

B. Irish Supreme Court and Decisions of the United States Supreme Court

There have been a number of cases before the Irish Supreme Court in which the parties have cited decisions of the U.S. Supreme Court. Perhaps the best examples of this practice are in cases pertaining to a

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*

Constitutional right of privacy, such as *Norris v. The Attorney General*[37] and *McGee v. The Attorney General.*[38] Decisions of the U.S. Supreme Court have also been cited in cases dealing with freedom of religion. Perhaps the best known of these cases is *Quinn's Supermarket v. The Attorney General.*[39] Although the success of the plaintiffs in these cases varied (and it was most often plaintiffs who cited these U.S. Supreme Court decisions), the approach of the Irish Supreme Court was consistent across these cases.

I will provide a brief overview of the facts of *Norris*, *McGee,* and *Quinn's Supermarket* before examining these cases in the context of the Irish Supreme Court's willingness to consider foreign judgments.

In *Norris*, the plaintiff, David Norris – a Trinity College Lecturer and Joycean Scholar (and, later, a member of the Irish Senate) – represented by barrister Mary Robinson (later to become President of Ireland and the United Nations High Commissioner for Human Rights) brought a lawsuit to challenge sections 61 and 62 of the Offenses Against the Person Act, 1861, and section 11 of the Criminal Law Amendment Act, 1885.[40] These laws, inherited from the British legal system, outlawed, among other things, male-male sexual acts. Specifically, sections 61 and 62 of the Offenses Against the Person Act criminalized "buggery" and provided for a maximum sentence of life imprisonment with hard labor.[41] Section 11 of the Criminal Law Amendment Act outlawed gross indecency between males.[42] (Oscar Wilde had been sentenced to prison in the United Kingdom in the late 19th Century for violating the latter statute.)

Norris relied upon provisions of the Irish Constitution pertaining to, inter alia, personal dignity and the right of privacy.[43] In support of these latter arguments, Norris cited decisions of the U.S. Supreme Court, particularly *Stanley v. Georgia*[44] and *Griswold v. Connecticut.*[45] He also cited relevant portions of the European Convention on Human Rights, most particularly Article 8, pertaining to the right of privacy.[46] Finally,

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37. [1984] I.R. 36 (Ire.).

38. [1974] I.R. 284 (Ire.).

39. [1972] I.R. 1 (Ire.).

40. [1984] I.R. 36 (Ire.).

41. Offences Against the Person Act 1861, §§ 61-62.

42. Criminal Law Amendment Act 1885, § 11.

43. *Norris*, [1984] I.R. 36 (Ire.).

44. 394 U.S. 1 (1969).

45. 381 U.S. 479 (1965).

46. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (1955) [hereinafter Convention for the Protection of Human Rights].

Norris cited to the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*[47] which had considered a challenge to the same laws challenged by Norris.

In *McGee v. The Attorney General*, a woman who had been advised against any further pregnancies by her physician challenged Irish laws pursuant to which certain contraceptives had been seized by Irish customs authority.[48] The plaintiff cited provisions of the Irish Constitution relating to personal dignity and the right of privacy.[49] In support of her arguments, plaintiff relied heavily upon the U.S. Supreme Court decision of *Griswold v. Connecticut,*[50] establishing a marital right of privacy.

Finally, in *Quinn's Supermarket v. The Attorney General,* plaintiffs challenged an Irish law which restricted the hours of operation of butcher shops, but which created an exception for shops selling kosher meat.[51] The plaintiffs relied upon provisions of Article 44 of the Irish Constitution which provide that "[t]he State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."[52] In support of their claim, the plaintiffs cited decisions of the U.S. Supreme Court, including *McGowan v. Maryland.*[53]

The outcome of the particular cases is less significant than an examination of the approach by the Irish Supreme Court to the citation of authority from the U.S. Supreme Court in support of claims raised under the Irish Constitution. The Irish Supreme Court was open to consideration of U.S. Supreme Court decisions. A number of Irish Supreme Court Justices employed the same judicial interpretive techniques when considering the U.S. Supreme Court decisions as they would in considering previous cases of the Irish Supreme Court. That is, these Justices argued by analogy, or sought to distinguish the facts of the U.S. Supreme Court decisions from the facts before the Irish court or argued that there were significant differences in the principles being compared. They debated these issues among themselves in their opinions. In none of these Irish cases, however, did a single Irish Supreme Court justice reject out of hand the authority of a foreign national court applying non-Irish law, when considering interpretation on the relevant provisions of Irish Constitutional law.

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47. 4 Eur. Ct. H.R. (ser. A) at 23-24 (1981).
48. [1974] I.R. 284 (Ire.).
49. *Id.*
50. 381 U.S. 479 (1965).
51. [1972] I.R. 1 (Ire.).
52. Art. 44.2.3, Constitution of Ireland, 1937.
53. 366 U.S. 582 (1961).

In his concurring opinion in *McGee*,[54] for example, Irish Supreme Court Justice Henchy quoted with approval from the concurring opinion of U.S. Supreme Court Justice Goldberg in *Griswold v. Connecticut*,[55] in which Justice Goldberg himself quoted approvingly of the opinion of Mr. Justice Harlan in *Poe v. Ullman* to the effect that "the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected."[56]

In dissenting in *McGee*,[57] Irish Supreme Court Chief Justice Fitzgerald sought to distinguish *Poe v. Ullman*,[58] *Griswold v. Connecticut*,[59] and *Eisentstadt v. Baird*.[60] He did so by observing that the Irish law forbade only the importation or sale of the contraceptives at issue, and not their domestic manufacture or possession. It was theoretically possible (though highly unlikely), that contraceptives could be manufactured in Ireland and distributed free of charge. Therefore, Justice Fitzgerald argued that U.S. Supreme Court cases striking down state laws prohibiting the possession or distribution of contraceptives were inapposite. Justice Henchy responded to this argument in his concurring opinion:

> It has been argued that Griswold's Case . . . is distinguishable because the statute in question there forbade the use of contraceptives, whereas s. 17 of the Act of 1935 only forbids their sale or importation. . . . However, I consider that the distinction sought to be drawn is one of form rather than substance. The purpose of the statute in both cases is the same: it is to apply the sanction of the criminal law in order to prevent the use of contraceptives.[61]

Justice Walsh, in writing the majority opinion for the Irish Supreme Court, did not refer explicitly to the U.S. Supreme Court cases cited by the plaintiffs. He explained his reasoning in an apologetic tone:

> Three United States Supreme Court decisions were relied upon in argument by the plaintiff: *Poe v. Ullman (1961) 367 U.S. 497; Griswold v. Connecticut (1965) 381 U.S. 479; and Eisenstadt v. Baird (1972) 405 U.S. 438.* My reason for not referring to them is not because I did not find them helpful or relevant, which indeed they were, but because I

54. [1974] I.R. 284 (Ire.).
55. 381 U.S. 479.
56. 367 U.S. 497, 553 (1961).
57. [1974] I.R. 284 (Ire.).
58. 367 U.S. 497.
59. 381 U.S. 479.
60. 405 U.S. 438 (1972).
61. *McGee*, [1974] I.R. 284 (Ire.).

> found it unnecessary to rely upon any of the dicta in those cases to support the views which I have expressed in this judgment.[62]

I turn to the *Norris*[63] case; Senator Norris lost his case in the Irish Supreme Court, which held by a majority that the Irish Constitution did not prevent criminalization of homosexual acts.

In his dissenting opinion in *Norris*, Irish Supreme Court Justice McCarthy cited to decisions of the U.S. Supreme Court, particularly to those concerning a right of privacy, e.g., *Stanley v. Georgia*,[64] *Terry v. Ohio*,[65] and *Griswold v. Connecticut*.[66] In his majority opinion upholding the Irish statutes prohibiting same-sex sexual relations, Irish Supreme Court Chief Justice O'Higgins responded to the dissents of Justices McCarthy and Henchy, but did not argue that the decisions of the U.S. Supreme Court had no place in a discussion of the legality of Irish statutes under the Irish Constitution.[67]

Finally, in *Quinn's Supermarket v. The Attorney General*,[68] Irish Supreme Court Justice Walsh cited to a number of U.S. Supreme Court decisions concerning freedom of religion, including *McGowan v. Maryland*,[69] *Sherberet v. Verner*,[70] *Braunfield v. Brown*,[71] and *School District of Abington Township v. Schempp*.[72] He explored at great length the concurring opinion of Justice Brennan (a personal friend of Justice Walsh) in *School District of Abington Township v. Schempp*, and commented, "The words of Mr. Justice Brennan are very pertinent to the question at issue in this case."[73]

Irish Supreme Court Justice Kenny dissented in *Quinn's Supermarket*.[74] He argued that the first amendment to the U.S. Constitution and the interpretations thereof in the U.S. Supreme Court spoke to different issues than those implicated by the Irish Constitution and the facts in *Quinn's Supermarket*.[75] He did not, however, dismiss out

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62. *Id.*
63. [1984] I.R. 36 (Ire.).
64. 394 U.S. 557 (1969).
65. 392 U.S. 1 (1978).
66. 381 U.S. 479 (1965).
67. *See Norris*, [1984] I.R. 36 (Ire.).
68. [1972] I.R. 1 (Ire.).
69. 366 U.S. 582 (1961).
70. 374 U.S. 398 (1963).
71. 366 U.S. 599 (1961).
72. 374 U.S. 203 (1963).
73. *Quinn's Supermarket*, [1972] I.R. 1 at 11 (Ire.).
74. *Id.*
75. *Id.*

of hand the use of decisions of a court interpreting foreign national law in interpreting the relevant provisions of the Irish Constitution.

These cases demonstrate a willingness of the Irish Supreme Court, when interpreting the Irish Constitution, to consider arguments based upon authority provided by a national court interpreting the provisions of foreign national law.[76] Constitutionally, however, foreign national law is in the same position as international agreements or decisions of international courts interpreting these agreements. Neither foreign national law nor international law has been enacted by the Irish legislature. Neither can become part of the Irish domestic law unless incorporated into Irish law by Irish legislation. Nevertheless, the Irish Supreme Court remains open to considering judgments of the U.S. Supreme Court.

Does the Irish Supreme Court display the same willingness towards decisions of international courts interpreting international law? The answer is a resounding no. The next section demonstrates that, despite the fact that neither foreign national law nor international law form part of Irish domestic law, foreign national law, at least as represented by the decisions of the U.S. Supreme Court, enjoys a privileged position in the Irish Constitutional order.

The Irish Supreme Court has displayed a greater hostility towards considering decisions of international courts interpreting international law, at least as represented by decisions of the European Court of Human Rights interpreting the European Convention on Human Rights.

C. Irish Supreme Court and Decisions of the European Court of Human Rights

Perhaps the most telling indication of the Irish Supreme Court's reluctance to consider the relevance of international law in the interpretation of Irish national law is the virtual absence of any citation of such law in support of a particular interpretation of the Irish Constitution.[77] In none of the cases considered in the previous section did any of the Irish Supreme Court Justices cite any decision of the European

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76. Indeed, the Irish Courts have been willing to consider decisions of U.S. State Supreme Courts. In *Webb v. Ireland*, Justice McCarthy cited with approval a case from Maine, "[i]n this regard I find most persuasive the judgment of Whitehouse J, giving the judgment of the Supreme Judicial Court of Maine in *Weeks v. Hackett* (1908) 71 Atl. Rep. 858 where English and American authorities up to that date (1908) were cited." [1988] I.R. 353 (Ire.).

77. There are a small number of exceptions to this observation. In both *O Domhnaill v. Merrick*, [1984] I.R. 151 (Ire.), decided by Justice Hendig and *Desmond v. Glackia*, [1993] 2 I.R. 43 (Ire.) decided by Justice O'Hanlon, reference was made to the desirability of reading Irish law in light of Ireland's obligations under the European Convention on Human Rights. Their views have not prevailed.

Court of Human Rights in support of a particular construction of the Irish Constitution.

This lacuna seems particularly anomalous in the *Norris*[78] case. Prior to the lawsuit in *Norris*, a plaintiff in Northern Ireland had brought a case before the European Court of Human Rights challenging Northern Ireland's laws prohibiting same-sex sexual conduct.[79]

The laws challenged by Dudgeon were identical to the laws challenged by David Norris (recall that Ireland inherited United Kingdom laws existing at the time of the creation of the Irish Free State, including the British laws that both Norris, and Dudgeon, sought to challenge). By the time the Irish Supreme Court considered the *Norris* case, the European Court of Human Rights had ruled in *Dudgeon* that the laws at issue violated Article 8 of the European Convention on Human Rights. Thus, it was a virtual certainty that the European Court of Human Rights ultimately would reach the same conclusion in the *Norris* case, and that Ireland would be forced to amend its criminal laws, as had the United Kingdom in Northern Ireland.

The basic principle set forth in Article 8 of the Convention that "[e]veryone has the right to respect for his private and family life, his home and his correspondence,"[80] is not dissimilar to the largely judicially-created right of privacy established under the Irish Constitution. Consideration of decisions by the European Court of Justice concerning interpretation of this clause, and of limitations on the right of privacy contained in the subsequent clause of Article 8, would appear relevant to the challenge brought by Norris. The facts of *Norris* and *Dudgeon* were much closer than the facts of *Norris* and any of the U.S. Supreme Court decisions that were considered.

In *Norris*, the majority opinion by Irish Supreme Court Chief Justice O'Higgins rejected consideration of the *Dudgeon* decision out of hand. In dismissing this suggestion, Justice O'Higgins wrote:

> Recently the European Court of Human Rights, which is the appropriate body to do so under the Convention, interpreted this article 8 on a complaint by Jeffrey Dudgeon, a citizen of Northern Ireland, that the legislation impugned in this action, which was then in force in Northern Ireland, interfered with his rights as a homosexual. By a majority verdict the European Court held that it did so and that, accordingly, ss. 61 and 62 of the Offences Against the Person Act, 1861

78. [1984] I.R. 36 (Ire.).

79. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981).

80. Convention for the Protection of Human Rights, *supra* note 46, at art. 8.1.

> and s. 11 of the Criminal Law Amendment Act, 1885, were inconsistent with the observance of article 8 of the Convention.
>
> Mrs. Robinson has argued that this decision by the European Court of Human Rights should be regarded by this Court as something more than a persuasive precedent and should be followed. She contends that, since Ireland confirmed and ratified the Convention, there arises a presumption that the Constitution is compatible with the Convention and that, in considering a question as to inconsistency under Article 50 of the Constitution, regard should be had to whether the laws being considered are consistent with the Convention itself. While I appreciate the clarity of her submission, I must reject it [as] in my view, acceptance of Mrs. Robinson's submission would be contrary to the provisions of the Constitution itself and would accord to the Government the power, by an executive act, to change both the Constitution and the law. The Convention is an international agreement to which Ireland is a subscribing party. As such, however, it does not and cannot form part of our domestic law nor affect in any way questions which arise thereunder. This is made quite clear by Article 29, s. 6, of the Constitution which declares:- 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.'[81]

Chief Justice O'Higgins concluded, "[n]either the Convention on Human Rights nor the decision of the European Court in *Dudgeon* v. *United Kingdom* (1981) 4 E.H.H.R. 149 is in any way relevant to the question which we have to consider in this case."[82] At a minimum, for the reasons given above, this observation is factually inaccurate.

V. ANALYSIS

A. Introduction

The refusal by the Irish Supreme Court to expressly consider international law, such as the European Convention on Human Rights, may be understandable in light of the dictates of the Irish Constitution. However, it is less easy to justify the outright dismissal of consideration of opinions of international courts, such as the European Court of Human Rights, particularly when they are interpreting concepts very close to those at issue in the cases before the Irish Supreme Court. In the latter instance, the Irish Supreme Court is not applying the law as it is contained in the

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81. *Norris*, [1984] I.R. 36 (Ire.).

82. *Id.*

international agreement. Instead, the Court is simply informing its view of some fairly amorphous law by reference to the opinion of international jurists interpreting similar concepts.

This dismissal of the relevance of the opinions of foreign courts applying international law is made more difficult to understand when compared to the ease with which the Irish Supreme Court entertains legal arguments that cite decisions of the U.S. Supreme Court. In the case cited in my paper, the U.S. Constitution was no more a part of the Irish law than was the European Convention on Human Rights. The U.S. Supreme Court is in no better position to influence the interpretation of the Irish Constitution than is the European Court of Human Rights. Yet in the cases examined, the Irish Supreme Court implicitly accepted the relevance of the U.S. Supreme Court decisions, sometimes in quite disparate factual settings, even while simultaneously dismissing offers to consider opinions of the European Court of Human Rights that considered the precise statutory law under consideration by the Irish court.

In addition, the Irish Supreme Court defers entirely to the interpretations of the European Court of Justice on issues of European Union law that directly arise in the Irish courts, even against challenges brought directly under the Irish Constitution. The Irish Supreme Court asserts that its role in cases involving European Union law consists simply of applying interpretations provided by the European Court of Justice.

The express provisions of the Irish Constitution provide a partial explanation for the difference in attitudes. This is particularly true in the case law of the European Union, where the Irish Constitution expressly provides for the direct effect and supremacy of such law over Irish law, including Irish Constitutional law. However, in *Campus Oil*,[83] we see the Irish Supreme Court granting greater deference than that formally required under European Union law.

The conflicting attitudes to the decisions of the U.S. Supreme Court and the European Court of Human Rights cannot be so readily explained by reference to the Irish Constitution. Although the Irish Constitution does not contain an express provision regarding foreign national law (as it does regarding international agreements), the Irish Constitution implicitly contains prohibitions to giving effect to laws as announced by the U.S. Supreme Court. Yet the Irish Supreme Court considers decisions of the U.S. Supreme Court almost as if these were prior precedents of the Irish Supreme Court itself.

The next section attempts to provide an explanation for this difference in approach by the Irish Supreme Court. It argues that the

83. [1983] I.R. 88 (Ire.).

difference depends upon the unstated relationship between the Irish Supreme Court and the other courts whose decisions are offered for consideration.

B. A Question of Horizontal and Vertical Relationships?

1. Introduction

The explanation for the apparently inconsistent approach of the Irish Supreme Court to consideration of decisions by "foreign" courts, such as the European Court of Justice, the European Court of Human Rights, and the U.S. Supreme Court, may lie in the unstated relationship between the Irish Supreme Court and these other courts. Related to this unstated perception of the relationship between these courts is the possibility that another court might comment directly upon the interpretation of law given by the Irish Supreme Court.

Where the relationship between the Irish court and the "foreign" court is horizontal, the Irish Supreme Court is open to considering the decisions of the foreign court. Where the relationship is vertical, the Court is hostile to considering the opinion of the foreign court. Where the relationship is horizontal, there is little or no possibility that the foreign court will comment directly on an interpretation of law given by the Irish Supreme Court. Where the relationship is vertical, there is the possibility that the foreign court may comment upon, and disagree with, the opinion given by the Irish Supreme Court. In some sense, the willingness or lack of willingness to consider foreign judgments may be a function of the Irish Supreme Court's collective fear of being criticized in its interpretation of the law at issue.

2. Irish Supreme Court and European Court of Human Rights – A Vertical Relationship

The relationship between the Irish Supreme Court and the European Court of Human Rights can be characterized as a vertical relationship. This means that the European Court of Human Rights would be in a position, in a proper case, to comment directly upon and potentially criticize the Irish Supreme Court in its interpretation of, for example, the European Convention on Human Rights. If this is true, then the Irish Supreme Court would be reluctant to entertain arguments based on decisions of the European Court of Human Rights interpreting the European Convention.

The European Convention on Human Rights allows individuals to bring claims against a Contracting Party, such as Ireland, directly before

the Court of Human Rights in Strasbourg.[84] However, two conditions must be satisfied. First, the Contracting Party must have agreed to allow itself to be sued in Strasbourg.[85] Second, the person bringing the complaint must have exhausted domestic remedies.[86] That is, the complaining party must first pursue a claim in the domestic courts under the domestic law of the Contracting Party before having recourse to a direct action in Strasbourg. Depending upon the Constitutional position of the Contracting Party, the domestic law may include the European Convention on Human Rights, and the complaining party may be able to rely directly upon the Convention in the domestic courts.

It has not been possible heretofore to raise the Convention directly in Irish courts, due to the dualist nature of the Irish Constitutional legal order (Ireland recently "incorporated" the convention into domestic law, but this does not affect the analysis herein). That does not prevent the Irish Supreme Court, when interpreting the Irish Constitution, from considering arguments by analogy to similar principles contained in the Convention, or from considering interpretations of these principles by the European Court of Human Rights. The Irish Supreme Court is restrained only from directly applying the terms of this international agreement in its rulings.

The Irish Supreme Court might, for example, decide in the course of interpreting the scope of the Irish right of privacy in family life to examine the corresponding right under the European Convention on Human Rights. Its decision on the Irish Constitution might then be influenced by its view of what another court might rule in applying a similar principle.

If a party were aggrieved by the decision of the Irish Supreme Court, that party would have a right to pursue an independent action in the European Court of Human Rights.[87] In the course of its ruling, the European Court of Human Rights might adopt a different ruling with respect to the Article of the Convention at issue, or comment directly on the interpretation of that Article by the Irish Supreme Court.

The Irish Supreme Court, hypothetically, might conclude that Article 8 of the European Convention[88] did not create a right of transsexuals to alter their birth certificates in order to allow them to marry a member of their post-operative, opposite sex. The Irish Supreme Court might interpret the Irish Constitution to lack such a right based, in part, on reasoning by analogy to the corresponding right of privacy in the

84. Convention for the Protection of Human Rights, *supra* note 46, at art. 34.

85. *Id.*

86. *Id.* at art. 35, § 1.

87. *Id.* at art. 34.

88. *Id.* at art. 8.

European Convention. The complainant, having exhausted domestic remedies, would be able to pursue the claim before the European Court of Human Rights.[89] In the course of that subsequent ruling, the Court of Human Rights might give a conflicting interpretation to Article 8, in effect "overruling" the Irish Supreme Court.

The Irish Supreme Court, at least in the cases cited above, has behaved consistently with the above premise. In none of the cases did any of the justices cite to principles arising under the European Convention on Human Rights, even though the Convention contains articles dealing directly with a right of privacy and freedom of religion. Ireland is a signatory to the Convention and has committed to abide by its principles. In the *Norris* case, the European Court had considered the precise statute challenged in the Irish Supreme Court. The only comment by a justice of the Supreme Court in these cases was that the Convention and the decisions of the European Court of Human Rights were "irrelevant," which, at a minimum, is factually inaccurate.[90]

3. Irish Supreme Court and the U.S. Supreme Court – A Horizontal Relationship

The Irish Supreme Court has shown itself willing to consider arguments based on decisions of the U.S. Supreme Court when interpreting arguably analogous provisions of the Irish Constitution. This willingness contrasts starkly with the outright rejection of citation to authority of the European Court of Human Rights. The Irish Constitutional position of decisions of the U.S. Supreme Court is approximately the same as that of decisions of international courts such as the European Court of Human Rights. Thus, the Irish Constitution itself fails to completely explain the apparent inconsistency.

If the relationship between the Irish Supreme Court and the U.S. Supreme Court is placed on a vertical-horizontal axis, however, the attitude of the Irish Supreme Court does not appear inconsistent. The relationship between the U.S. Supreme Court and the Irish Supreme Court appears to be horizontal, at least in the sense that there is little or no likelihood of the U.S. Supreme Court commenting upon or disagreeing with the interpretation by the Irish Supreme Court of rights arising under the U.S. Constitution. A claimant aggrieved by a decision of the Irish Supreme Court obviously is unable to bring a claim before the U.S. Supreme Court. The decision of the Irish Supreme Court on an

89. *Id.* at art. 35, § 1.

90. *See Norris*, [1984] I.R. 36 (Ire.).

interpretation of a right arising under the U.S. Constitution is unlikely ever to come to the attention of the U.S. Supreme Court.

Thus, if the willingness of the Irish Supreme Court to consider the decisions of a foreign court is influenced, in part, by the unstated horizontal or vertical nature of the relationship between the courts, the Irish Supreme Court should show a greater willingness to consider decisions of the U.S. Supreme Court. In the cases considered above, this in fact was the case. The justices of the Irish Supreme Court approached decisions of the U.S. Supreme Court as if they were previous decisions of the Irish Supreme Court. They employed the same judicial interpretive techniques as they would in interpreting decisions of Irish courts. Not a single judge suggested that, due to the Constitutional position of foreign law, it was inappropriate to entertain arguments based on decisions of the U.S. Supreme Court

4. The Irish Supreme Court and the European Court of Justice – A Horizontal Relationship?

A superficial anomaly appears in the relationship between the Irish Court and the European Court of Justice. The Irish Supreme Court shows the greatest deference to decisions of the European Court of Justice. However, under the Irish Constitution, the law of the European Union is supreme to Irish law, including Irish Constitutional law.[91] This might be perceived as establishing a vertical, rather than a horizontal relationship between the Irish Supreme Court and the European Court of Justice. If the relationship between these courts was vertical, we might expect to see reluctance to consider rulings of the European Court of Justice, notwithstanding the Constitutional position of European Union law.

A closer examination of the mechanics of the interrelationship between the Irish Supreme Court and the European Court of Justice reveals that their relationship exists on a horizontal rather than a vertical plane. The willingness of the Irish Supreme Court to consider decisions of the European Court of Justice, buttressed by the Irish Constitution, is consistent with the notion that it is the vertical or horizontal nature of the relationship between the Irish Supreme Court and the foreign court that influences the willingness to consider foreign judgments.

Article 234 (previously Article 177) of the European Community Treaty establishes a horizontal relationship between the Irish Supreme Court and the European Court of Justice.[92] This Article provides that if any issue of European Union law arises in an Irish court or tribunal, that

91. Art. 29.10, Constitution of Ireland, 1937.

92. EEC Treaty, *supra* note 22, at art. 234.

court may make a preliminary reference to the European Court of Justice.[93] If that issue of European Union law arises in a case before the Irish Supreme Court, the Irish Supreme Court must make a preliminary reference to the European Court of Justice.[94]

The reference is "preliminary" because the European Court of Justice does not adjudicate the dispute giving rise to the need for interpreting the law of the European Union. The European Court of Justice does not enter a final judgment. The European Court of Justice gives an interpretation of the law, and returns the ruling to the Irish Supreme Court for application in the particular case. The Irish Court applies the ruling and enters judgment.

This is not an appellate process, which would imply a vertical relationship between the courts. The decision whether to make a reference to the European Court of Justice rests entirely with the court, and not with the parties. The propriety of making or not making a reference to the European Court of Justice cannot be appealed to the European Court of Justice. In Ireland, the order making or refusing a preliminary reference cannot be appealed in the national courts.

After the preliminary ruling has been sent to and applied by the Irish Supreme Court, a party cannot appeal that application to the European Court of Justice. If the parties believe that the Irish Supreme Court has misapplied the ruling they are without a remedy to the European Court of Justice. In theory, if the Irish Supreme Court consistently refused to make a preliminary reference to the European Court of Justice or consistently misapplied (or ignored) preliminary rulings by the European Court of Justice, the European Commission could prosecute Ireland before the European Court of Justice. Ireland might be subject to fines for the Court's malfeasance. The likelihood of this occurring is extremely remote.

The relationship between the Irish Supreme Court and the European Court of Justice is horizontal, despite the supremacy of European Union law in the Irish Constitutional order. There is no chance that the European Court of Justice will directly comment upon or criticize a ruling of the Irish Supreme Court applying the law of the European Union. The Irish court is not under the watchful eye of the European Court of Justice in the sense that an inferior court in a vertical relationship may be criticized by a higher court for an erroneous interpretation of law. In one sense, the Irish Supreme Court is on the same level as the European Court of Justice.

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93. *Id.*

94. Art. 29.10, Constitution of Ireland, 1937.

The behavior of the Irish Supreme Court is therefore consistent with the premise that the willingness of the Irish Supreme Court to consider the decision of a "foreign" court depends in part upon whether the Irish Court is in a vertical or horizontal relationship with that court.

VI. CONCLUSION

My paper has sought to bring some coherence to the attitude of the Irish Supreme Court towards considering opinions of foreign courts. From an Irish perspective, the decisions of courts applying foreign law can be divided into three parts: courts applying foreign national law, courts applying supranational law, and courts applying international law. The Irish Constitution places foreign national law and international law in roughly the same category relative to their suitability as sources of law in the interpretation of the Irish Constitution. Supranational law occupies a privileged position in the Irish Constitutional legal order. The Irish Supreme Court appears willing to consider decisions of courts applying supranational law and courts applying foreign national law, while rejecting the relevance of decisions of courts applying international law. This approach is inconsistent when viewed strictly from an Irish Constitutional perspective.

I have suggested that the approach of the Irish Supreme Court to decisions of foreign courts is consistent if the relationship of the Irish Court to the foreign court is placed on a vertical-horizontal axis. Where the relationship between the Irish Supreme Court and the foreign court is vertical, in the sense that the foreign court can comment directly upon and criticize the Irish Supreme Court's interpretation of foreign law, the Irish Supreme Court is hostile to the offer of opinions of these foreign courts as a source of authority when considering interpretations of the Irish Supreme Court. Where the relationship between the Irish Court and the foreign court is horizontal, in the sense that there is little or no likelihood of a direct criticism of the Irish Supreme Court's interpretation of foreign law, the Irish Court is open to offers of foreign authority in interpreting the Irish Constitution.

In several cases before the Irish Supreme Court, *Norris v. The Attorney General*,[95] *McGee v. The Attorney General*,[96] *Campus Oil v. Ministry of Industry & Energy*,[97] *Campus Oil v. Ministry of Industry (No.*

95. [1984] I.R. 36 (Ire.).

96. [1974] I.R. 284 (Ire.).

97. [1983] I.R. 83 (Ire.).

2),[98] and *Quinn's Supermarket v. The Attorney General*,[99] the Justices of the Irish Supreme Court behaved consistently with the foregoing premise. They rejected opinions of the European Court of Human Rights, which occupies a vertical relationship with the Irish Supreme Court. They were open to opinions of the European Court of Justice and the U.S. Supreme Court, which occupy a horizontal relationship with the Irish Supreme Court. These observations suggest that it may be a fear of contradiction which underpins the reluctance of the Irish Supreme Court to consider opinions of, for example, the European Court of Human Rights.

Do these observations offer any insight into the willingness of the U.S. Supreme Court to consider opinions of foreign courts, such as the European Court of Human Rights, when examining issues arising under the U.S. Constitution? If my theory is correct in the context of the Irish Supreme Court, and applies to other Constitutional courts, it may suggest that, at the heart of opposition to consideration of opinions of some foreign courts is a lack of confidence in the relationship between these courts, and a fear of criticism. If a Justice saw a foreign court as a "sister" court in the sense of occupying the same hierarchal position on a vertical-horizontal plane, that Justice might be willing to consider opinions of this foreign court in interpreting analogous provisions of the U.S. Constitution. If a Justice saw a foreign court as occupying a vertical position relative to the U.S. Supreme Court, or feared criticism of this court in interpreting this court's decisions, a Justice might exhibit hostility towards the notion of considering that court's opinions in interpreting analogous provisions of the U.S. Constitution. Ironically, it may be the case that those U.S. Supreme Court Justices most hostile to considering decisions of foreign courts are those Justice's who view the foreign courts as occupying a superior position in a hierarchy of legal norms.

98. [1983] I.R. 88 (Ire.).

99. [1972] I.R. 1 (Ire.).